

RESTORING FEDERAL TAKINGS CLAIMS

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RESPONSE TO *A KNOCK ON KNICK'S REVIVAL OF FEDERAL TAKINGS LITIGATION*

Let me begin by thanking Professors Stewart E. Sterk and Michael C. Pollack for the opportunity to comment on another example of their always brilliant scholarship, in this instance, *A Knock on Knick's Revival of Federal Takings Litigation*.¹ As they noted in their introduction, “many have cheered” the United States Supreme Court’s holding in *Knick v. Township of Scott* that overruled the second prong of *Williamson County*’s ripeness test. Litigants challenging state or local action as a taking were required to first seek compensation under state inverse condemnation provisions.² Indeed, I am one of those cheerleaders who has always struggled to understand this ripeness requirement that has kept so many takings claims from being litigated in federal court. It should be noted that the *Knick* Court left in place the first prong of *Williamson County*’s ripeness requirement that litigants obtain a final decision from local and state officials before filing their challenges.³ Obtaining finality before filing has always made sense to me given that determining whether a regulation has gone “too far” (as in *Pennsylvania Coal v. Mahon*⁴ parlance) requires us to understand the extent of its impact on the property interest.

As recognized by Professors Sterk and Pollack, “[t]he *Williamson County* opinion appeared to contemplate that a landowner could ripen a federal court takings claim by seeking all relief available under state law.”⁵ However, that process has been subverted at times by state and local officials who have removed a takings challenge originally filed in state court to federal court, only to have the federal court dismiss that takings claim as unripe because the plaintiff “had not sought and been denied just compensation in a state court inverse condemnation action.”⁶ In *Knick*, the plaintiff did not seek compensation for an

1. Stewart E. Sterk & Michael C. Pollack, *A Knock on Knick's Revival of Federal Takings Litigation*, 72 FLA. L. REV. 419 (2020).

2. *Id.* at 421.

3. See *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2169 (2019) (“*Knick* does not question the validity of this finality requirement, which is not at issue here.”); see also *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (“[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulation has reached a final decision.”).

4. 260 U.S. 393, 415 (1922).

5. Sterk & Pollack, *supra* note 1, at 423.

inverse condemnation from the state and instead sought declaratory and injunctive relief when notified that the plaintiff was violating the cemetery ordinance by not opening her land to the public during the day.⁷ The Township withdrew the violation notice and stayed enforcement, and then the state court denied equitable relief because there was not an ongoing enforcement action that would subject her to irreparable harm.⁸ Without a state remedy, Rose Knick filed a Section 1983 action in federal court and it was dismissed under *Williamson County*.⁹ On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the ripeness dismissal, even though it “noted that the ordinance was ‘extraordinary and constitutionally suspect.’”¹⁰

This ripeness ping-pong trap became a “Catch 22” after the Court in *San Remo Hotel* held that when property owners seek compensation from the state court as required by *Williamson County*, they may be barred from a subsequent claim in federal court.¹¹ If the state court finds no taking, or awards less than the compensation sought, the standard rules of issue and claim preclusion along with the federal full faith and credit statute bar their future federal court claim.¹² Professors Sterk and Pollack correctly identify the effect of combining *Williamson County* and *San Remo Hotel* as “operat[ing] to channel all takings claims (other than those against the federal government) into state court.”¹³ Nothing in *Williamson County* even alludes to an intent to use the second prong of its ripeness test to achieve this result.¹⁴ In fact, four Justices in the *San Remo Hotel* decision questioned the exhaustion requirement of this ripeness test, including two Justices, Justices Rehnquist and O’Connor, who had joined the majority opinion in *Williamson County*.¹⁵

6. *Snaza v. City of Saint Paul*, 548 F.3d 1178, 1181 (8th Cir. 2008). *Snaza* held that “the exhaustion requirement in *Williamson County*” is “still good law,” and even though “*Snaza* brought an inverse condemnation claim in state court, her federal takings claim will not be ripe unless and until she is denied just compensation on that state claim.” *Id.* at 1182.

See also *Warner v. City of Marathon*, 718 F. App’x 834, 838 (11th Cir. 2017) (removing takings claim dismissed under *Williamson County*).

7. *Knick*, 139 S. Ct. at 2168.

8. *Id.*

9. *Id.* at 2168–69.

10. *Id.* at 2169.

11. *See San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 336, 347–48 (2005).

12. *Id.*

13. Sterk & Pollack, *supra* note 1, at 424.

14. *See generally* *Williamson Cnty. Reg’l Plan. Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (lacking any intent to utilize the second prong of the ripeness test to operate as a channel for takings claims in state court).

15. *See San Remo Hotel*, 545 U.S. at 349–50, 352 (Rehnquist, J., concurring).

Exhaustion of administrative or judicial remedies is not required before bringing a Section 1983 action.¹⁶ The *Williamson County* majority discussed *Patsy v. Board of Regents of Florida*¹⁷ and distinguished it when discussing the finality ripeness requirement. The Court noted that,

The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Patsy* concerned the latter, not the former.¹⁸

The ripeness test at issue in *Knick* was not the same as the finality requirement the *Williamson County* Court distinguished from the “conceptually distinct” administrative remedies question in *Patsy*.¹⁹ Instead, *Knick* addressed the exhaustion of remedies requirement from *Williamson County*, which according to its own discussion of *Patsy*, should not have been required before bringing a Section 1983 action for a regulatory taking.²⁰

I strongly disagree with the characterization of the *Knick* decision as resting on a “shaky theoretical foundation.”²¹ The disagreement is based on both the merits of the decision and the Court’s willingness to overrule precedent.²² However, rather than rehashing arguments about the decision’s theoretical strength, the focus of this Response is instead directed to Professors Sterk and Pollack’s practical concerns about whether the decision “threatens to open the doors of federal courts to a variety of claims that the Court does not appear to have anticipated and that federal courts are ill-equipped to address.”²³

16. *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 498, 516 (1982) (examining employment case for race and gender discrimination).

17. 457 U.S. 496 (1982).

18. *Williamson Cnty.*, 473 U.S. at 192–93 (citations omitted).

19. *Id.* at 192.

20. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019).

21. Sterk & Pollack, *supra* note 1, at 421.

22. See Ilya Somin & Shelley Ross Saxer, *Overturing a Catch-22 in the Knick of Time: Knick v. Township of Scott and the Doctrine of Precedent*, 48 *FORDHAM URB. L.J.* 545, 548, 550 (2020).

23. Sterk & Pollack, *supra* note 1, at 419.

I. STATE LAW AND FEDERAL LITIGATION

In *Board of Regents of State Colleges v. Roth*,²⁴ the Court examined a university professor's challenge to the school's failure to rehire him as constituting a violation of the Fourteenth Amendment's procedural protection of liberty and property.²⁵ The Court first determined that a person who is not rehired in one job is not deprived of liberty.²⁶ It then turned to the Fourteenth Amendment's property interest safeguard and found that the professor did not have a property interest in being rehired because his employment contract did not provide for contract renewal.²⁷ The Court in an oft-cited statement declared,

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.²⁸

State law determines what constitutes a property interest, and property is an important component under the Fifth Amendment which states “nor shall private property be taken for a public use, without just compensation.”²⁹ However, unlike Professors Sterk and Pollack, this Response would not conclude that the outcome of federal takings litigation “largely turns on state property law.”³⁰ Typically, in either an eminent domain or a regulatory taking action, there is not a question as to the property interest at issue. One exception to the norm is when the court is faced with the “denominator” issue confronted in *Murr v. Wisconsin*.³¹ Determining the property interest that constitutes the denominator against which the degree of the regulation's economic impact is measured certainly requires a court to evaluate state property law in order to identify the property interest being taken.³²

24. 408 U.S. 564 (1972).

25. *Id.* at 566, 569–70.

26. *Id.* at 575.

27. *Id.* at 578.

28. *Id.* at 577.

29. U.S. CONST. amend. V.

30. Sterk & Pollack, *supra* note 1, at 437.

31. 137 S. Ct. 1933 (2017).

More significantly, my understanding is that the most complex issue that courts must address in regulatory taking claims is whether a “taking” has occurred. The Court in *Pennsylvania Coal v. Mahon* stated that “[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”³³ The federal courts and the U.S. Supreme Court in particular have struggled for almost 100 years to provide the framework for determining when a regulation or government action has gone “too far.”³⁴ Therefore, this Response does not agree with the Article’s conclusion that federal courts are ill-equipped to handle regulatory taking claims simply because they “will frequently rest on the substance of state property law.”³⁵ Instead, it argues that the federal courts are in the best position to resolve whether a regulatory taking has occurred based on federal precedent.³⁶

Implicit takings are identified in the Article as arising “when, acting in an enterprise capacity, government causes harm that would, if committed by a private owner, be compensable under state nuisance or trespass law.”³⁷ These actions may be cognizable under tort law, but governmental tort immunity has encouraged plaintiffs to file state or federal inverse condemnation claims instead. The state takings claims may depend upon whether a state constitution includes a damaging clause associated with an action for inverse condemnation.³⁸ Landowners have successfully brought these claims in both state and federal courts to address harms caused by government or private actions that benefit the public, but damage individual landowners.³⁹

Inverse condemnation claims have been litigated in state courts and in federal courts applying state law, including in the *Pacific Gas & Electric (PG&E)* bankruptcy decision.⁴⁰ In that case, the court predicted

32. See Sterk & Pollack, *supra* note 1, at 439 (correctly pointing out that “defining property rights is ultimately a state law function”).

33. 260 U.S. 393, 415 (1922).

34. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (noting that “[t]he rub, of course, has been—and remains—how to discern how far is ‘too far’” and then discussing the Court’s precedent in addressing this question).

35. Sterk & Pollack, *supra* note 1, at 437.

36. See *infra* text preceding notes 44–48.

37. Sterk & Pollack, *supra* note 1, at 439.

38. See Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 344–46 (2018) (noting that twenty-seven state constitutions contain a damaging clause to cover harms to landowners “where nothing has been taken or regulated, but [where the] landowners are nonetheless unfairly burdened by a project for public benefit” and tort immunity precludes liability).

39. See Shelley Ross Saxer, *Paying for Disasters*, 68 KAN. L. REV. 413, 425–55 (discussing inverse condemnation claims for damages suffered from disasters such as floods and wildfires).

40. *In re PG & E Corp.*, 611 B.R. 110, 112–13 (Bankr. N.D. Cal. 2019).

that the California Supreme Court would conclude that California's inverse condemnation doctrine applies to PG&E.⁴¹ The bankruptcy court upheld California's strict liability inverse condemnation doctrine after extensively reviewing California law.⁴² This review analyzed law dating as far back as 1894, which allowed fire victims to bring inverse condemnation claims under the state constitution against private entities providing public utility services.⁴³ The federal courts are completely capable of applying state law to determine whether the state constitution allows property owners to pursue inverse condemnation claims for harms resulting from actions taken for the public benefit. The fear that federal courts will become enmeshed in construing state constitutional provisions can be addressed by the availability of federal abstention doctrines such as the *Burford*,⁴⁴ *Pullman*,⁴⁵ *Younger*,⁴⁶ or *Rooker-Feldman*⁴⁷ abstention doctrines. In fact, with the overruling of *Williamson County*, the *Rooker-Feldman* doctrine, which applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments,"⁴⁸ will be available to block a federal litigant's claim, even if preclusion would not.⁴⁹ Unlike Professors Sterk and Pollack, this Response does not read *Knick* as "foreclos[ing] federal abstention, pending resolution of these state constitutional claims."⁵⁰

41. *Id.* at 112.

42. *Id.* at 112–13.

43. *Id.* at 113.

44. *See* *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943) (abstention is appropriate for federal courts to avoid interfering with complex state regulation that requires the independent exercise of domestic policy by state government).

45. *See* *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941) (encouraging federal courts to abstain from hearing cases that require unsettled questions of state law or policy to be resolved before addressing federal constitutional issues).

46. *See* *Younger v. Harris*, 401 U.S. 37, 40–41 (1970) (federal court allowed to abstain from hearing a federal claim if there is a state action pending in state court involving the same issues).

47. *See supra* text preceding note 43.

48. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

49. *See* *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring) (noting that the preclusion holding "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court. And, even if preclusion law would not block a litigant's claim, the *Rooker-Feldman* doctrine might, insofar as *Williamson County* can be read to characterize the state courts' denial of compensation as a required element of the Fifth Amendment takings claim") (citations omitted).

50. Sterk & Pollack, *supra* note 1, at 441.

II. FINAL DECISION REQUIREMENT

The remaining practical issues identified by Professors Sterk and Pollack,

focus[] on two other issues certain to provoke future litigation: When is a taking “final” within the meaning of *Williamson County*’s first ripeness requirement, and does the *Knick* ruling open the doors of the federal courthouse to the myriad valuation claims that arise when state and local government institute condemnation proceedings?⁵¹

These two issues have the potential to be problematic if the *Knick* opinion invites litigants to bring these claims into federal court. First, Professors Sterk and Pollack express concerns that because the finality requirement from *Williamson County* was unchallenged in *Knick*, “federal courts will inevitably be drawn into the[] thickets” of deciding ripeness based on what might be multiple efforts at the local and state level to ripen claims.⁵² In addition, courts will need to determine whether there is a futility exception to the ripeness requirement and what evidence will support such an application.⁵³ Finally, Professors Sterk and Pollack question whether the *Knick* Court, by not finding the finality requirement to be at issue, is signaling that it will revisit this requirement.⁵⁴ This Response agrees that determining ripeness based on finality is an issue that could embroil federal courts in the weeds of various state and local procedures and land use regulation entities such as planning commissions and boards of zoning adjustments. Still, federal courts have faced this issue in the past without great consternation or confusion as to determining either finality or futility.⁵⁵

51. *Id.* at 437.

52. *Id.* at 444.

53. *Id.*

54. *Id.*

55. *See, e.g.,* Palazzolo v. Rhode Island, 533 U.S. 606, 625–26 (2001). The Court found that the state supreme court erred in declaring takings claims were unripe and explained that:

Where the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited noncompliance with reasonable state-law exhaustion or pre-permit processes, federal ripeness rules do not require the submission of further and futile applications with other agencies

Id. (citations omitted); *Suitum v. Tahoe Reg’l Plan. Agency*, 520 U.S. 725, 735, 744 (1997) (finding that landowner “received a ‘final decision’” and citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) as “the first case in which this Court employed a notion of ripeness in declining to reach the merits of an as-applied regulatory takings claim”); *Islamic Cmty. Ctr. for*

III. IMPACT ON CONDEMNATION PROCEEDINGS

Explicit takings cases—eminent domain actions—may now be subject to review by federal courts after *Knick* because the “taking” inquiry has been expressly separated from the “just compensation” inquiry.⁵⁶ States vary as to when the government condemnor acquires title and the condemnee acquires the right to compensation.⁵⁷ However, even if a federal takings claim becomes ripe under the finality requirement before the state determines how much compensation is owed, the federal court is allowed to refrain from deciding state valuation issues using its discretion under the various abstention doctrines.⁵⁸ Additionally, federal courts are competent to adjudicate “public use” challenges, such as the challenge faced in *Kelo v. City of New London*, even if “states impose public use limitations that restrict governments more than those articulated by the Supreme Court do.”⁵⁹

CONCLUSION

Federal courts have confronted state and local land use regulation challenges on many different fronts including takings, due process, equal protection, and the first amendment. They have limited their review of substantive due process claims to avoid “a garden-variety zoning dispute dressed up in the trappings of constitutional law.”⁶⁰ Instead of requiring that a land-use regulation be arbitrary and capricious in order to violate substantive due process, federal courts have required that “[i]n the zoning and land use context,” the government conduct must meet the “‘shocks-the-conscience’ standard” to “avoid converting federal courts into super zoning tribunals.”⁶¹ Federal courts could similarly set a higher threshold for reviewing takings claims from state and local land use regulation.

Even though federal judges “rarely deal with property disputes” and state court judges confront property issues more frequently,⁶² regulatory takings claims will most likely be decided based on U.S. Supreme Court precedent as to what constitutes a “taking.” While federal judges, especially at the appellate level, may not be from the same state as the

Mid Westchester v. City of Yonkers Landmark Pres. Bd., 258 F. Supp. 3d 405, 417 (S.D.N.Y. 2017) (finding that “[p]laintiffs have yet to apply for a certificate of appropriateness, appeal from an unfavorable ruling, or apply for economic hardship, and therefore the futility exception to the final-decision requirement is inapplicable”).

56. Sterk & Pollack, *supra* note 1, at 445.

57. *See id.*

58. *See supra* text preceding notes 39–44.

59. Sterk & Pollack, *supra* note 1, at 448.

60. Coniston Corp. v. Vill. of Hoffman Ests., 844 F.2d 461, 467 (7th Cir. 1988).

61. Skiles v. City of Reading, 449 F. App’x. 153, 157 (3d Cir. 2011).

62. Sterk & Pollack, *supra* note 1, at 437–38.

one in which the alleged taking occurred,⁶³ if there is an issue about what constitutes the property interest at issue, federal judges will be able to review the appropriate state law and apply the facts of the case to determine the relevant property interest.⁶⁴

63. *Id.* at 438.

64. *See San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 350–51 (2005) (Rehnquist, C.J., concurring) (citation omitted). Chief Justice Rehnquist observed that:

[T]he Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment In short, the affirmative case for the state-litigation requirement has yet to be made.